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IN THE

Supreme Court of the United States

October Term, 1970

No. 885

SNYDER TANK CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE and AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),

Respondents.

MEMORANDUM OF INTERVENOR IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Facts and Background

Four years and two months ago (October 7, 1966), the union herein, notified the Petitioner, that it represents a majority of its employees and demanded recognition as collective bargaining agent. The letter further stated:

> "We stand ready to prove our majority status by submitting our signed cards to any impartial government agency or an impartial third party" (Gen. Counsel Ex. 3).

The Petitioner refused to recognize the union on the ground that it "doubted that the union had been voluntarily designated by an uncoerced majority" (Gen. Counsel Ex. 4).

The facts and issues have been tried before a Trial Examiner of the National Labor Relations Board. They were reviewed by the Board (177 N.L.R.B. No. 94) and by the Court of Appeals of the Second Circuit (July 1, 1970, Docket Nos. 33943, 34094). Petitioner now seeks a new review by this Court.

The facts and background are:

Sometime in the middle of September 1966, the Intervenor [1] received a telephone call from Mr. Gravelle, an employee of respondent-appellant, asking the union to organize the employees of the employer [2] (Tr. p. 19, l. 1; p. 20, l. 6; TXD, p. 24, l. 8).

Thereafter, a union representative met with Mr. Gravelle at the latter's home and left with him union authorization cards for membership solicitation among the employees (Tr. p. 20).

Between September 18, or 19 of 1966, and October 7, an intensive campaign was carried on by the union for solicitation of union authorization cards (Tr. p. 21; TXD, p. 2, ll. 1-5), and on October 7, 1966, the union sent a letter to the employer advising that it has a majority of the employees in the barganing unit and demanding recognition and negotiation of a contract (Gen. Counsel Ex. 3).

Not having received a reply, the union filed a petition for certification on October 11, 1966 (Gen. Counsel Ex. 1). On October 12, 1966, the employer answered the letter of October 7, refusing the demand of the union for recognition and to bargain collectively (Gen. Counsel Ex. 4).

A hearing was thereupon ordered by the National Labor Relations Board under the provisions of Section 9(c) of

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[1] The Intervenor will be referred to as the Intervenor or the Union.

[2] The Respondent-Appellant will be referred to as Respondent or Employer.

the National Labor Relations Act, which hearing resulted in a Direction for an Election.

At the time of filing of the petition for certification by the union it simultaneously submitted to the Board eighty (80) authorization cards reading in part as follows:

> *"I, the undersigned, hereby designate, select and empower the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW, AFL-CIO) as my representative for the purpose of collective bargaining in respect to rate of pay, wages, hours of employment and other conditions of employment."* (Gen. Counsel Ex. 5(a) to 5(ccc)).

Thereafter and between the time of the filing of the petition by the union and the election ordered by the Board, the employer carried on a vicious campaign against the union, in violation of the provisions of Section 8(a)(1) of the National Labor Relations Act. As a result of the campaign the union lost the election and filed timely objections to the conduct effecting the result of the elections pursuant to the provisions of the National Labor Relations Act and its Rules and Regulations (Gen. Co. Ex. 1(a)).

On or about November 30, 1966, after the union had filed its petition and during the continuance of the organizational campaign, Mr. Douglas Gravelle, the person who originally called the union, was discharged for allegedly placing obstructions in an alleyway of the employer's plant.

The employer continued his refusal to recognize the union and negotiate with it. Whereupon, unfair labor charges were filed against the employer for violation of 8(a)(1) (anti-union campaign between the time of the demand for recognition and the date of the elections); 8(a)(3) (discharge of Douglas Gravelle in violation of the provisions of the N.L.R.A.); and 8(a)(5) (Refusal to Bargain).

A complaint was issued after a thorough investigation by the Regional Director of the N.L.R.B., Region 3, and

hearings were held before Hon. Morton D. Friedman, Trial Examiner.

The hearings were commenced on October 18, 1967, and were concluded on March 27, 1968 with various adjournments in between.

The Trial Examiner found that the Respondent-Appellant violated Section 8(a)(1) of the Act by its anti-union activities (TXD, p. 42, ll. 42-45); it violated 8(a)(3) of the Act by discriminatorily discharging Douglas Gravelle (TXD, p. 42, ll. 47-50); and violated Section 8(a)(5) of the Act by its refusal to recognize the union and negotiate with it when the union represented a majority of the employees of the employer (TXD, p. 43, ll. 14-19).

Questions Presented

Although the Petitioner cites five questions presented to this Court, they really are as follows:

1. Was the due process clause of the 5th Amendment to the U. S. Constitution violated as to the Petitioner?

2. Was the decision of the United States Supreme Court in *N.L.R.B. v. Gissel,* 395 U.S. 575 misconstrued by the Circuit Court of Appeals, or is it being misconstrued by the Petitioner herein?

3. Should this Court review the findings of fact and conclusions of law which were previously reviewed by the Circut Court of Appeals, sustaining the findings of fact and conclusions of law of a Trial Examiner and the National Labor Relations Board?

ARGUMENTS

I. The discharge of Douglas Gravelle.

Petitioner, in its memorandum, claims that the decision regarding the discharge of Douglas Gravelle was a denial of "due process". In its memorandum in support of the petition, citing *N.L.R.B. v. Prettyman*, 117 F.2d 876, it argue:

> "An employer is entitled to a hearing of and the decision of the charges against him according to the fundamental principles that adhere in due process of law—the decision of the Board shall be governed by and based upon the evidence produced at the hearing" (Petitioner's memorandum, p. 5).

But this is exactly what has happened in the instant case. The mere use of the word "horseplay" by the Trial Examiner to describe the incident is hardly a violation of the due process clause or sufficient ground for review by this Court, even if the term itself does not appear in the record.

II. The petitioner misreads or misinterprets this Court's decision in *N.L.R.B.* v. *Gissel*.

The Petitioner in its memorandum quotes the following excerpts from the Court's decision:

> "—employers [sic] should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above the signature"[3]

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[3] Petitioner omitted for some reason from the citation the following:

> "There is nothing inconsistent in handing an employee a card that says the signer authorizes the union to represent him and then telling him that card will probably be used first to get an election . . ."

> "We cannot agree with the employers here that employees as a rule are too unsophisticated to be bound by what they sign unless expressly told that their act of signing represents something else".

The memorandum then adds:

> "The Court of Appeals held the cards were clear on their face *and petitioner agrees* (emphasis supplied). It decided the Trial Examiner and the Board resolved what conflicting testimony there was against the company but did not review it" (Memorandum, p. 11) [4]

The Petitioner further states:

> "The union adherents admittedly solicited cards on the represenation they sought an election" (Memorandum, p. 11) [5]

III. The testimony cited by Petitioner.

The Petitioner refers the Court to footnote 13, page 8 of its memorandum, where it quotes extracts of the testimony. Following is a short review of the testimony cited by Petitioner. Each case is a very clear and concise illustration of the following statement of this Court in *N.L.R.B.* v. *Gissel*:

> "We also accept the observation that employees are more likely than not, many months after a card drive and in response to question by a company counsel, to give testimony damaging to the union, particularly where company officials have previously threatened reprisals for union activity in violation of Section 8(a)(1)."

The testimony of the individuals cited, not only was given many months after they signed their cards, but only

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[4] Query: How did the Court of Appeals know about the contents of the cards, if it did not review the record?

[5] Who "admittedly" made such representations?

after a few days after they were questioned and spoken to by a representative of the Petitioner.

(a) *Mr. Mateucci* testified that he signed the card at a meeting because he thought it was to show attendance. He did not remember anything that was said at the meeting. He did not recall whether "election" was mentioned at the meeting. He [Smigelski] "just talked about getting the union in and stuff like that" (Tr. p. 959, ll. 6-10; ll. 13-17). He read and filled out the entire card before he signed it (Tr. p. 959, ll. 20, 21).

(b) *Mr. Hinderliter* received his card together with a pamphlet. He read it, signed it and mailed it back (Tr. p. 617, ll. 8-12).

It was properly credited by the Trial Examiner.

(c) *Donald Bellanca* is a cousin of Jerry Snyder, President of Employer (Tr. p. 801, l. 6). He was rather vague in his testimony, which contradicted previous statements made in June 1967 to a Board Representative (Gen. Co. Ex. 16; Tr. pp. 801-805).

Although, he was very vague and forgetful about Mr. Smigelski's speech at the union meeting, the witness "remembered" that Smigelski said the cards would go to the N.L.R.B.

When asked on redirect, as to exactly what Mr. Smigelski said on this matter. The witness answered:

> "A. Well, it [the cards] would be sent to the Company and then *most likely* it would go to the N.L.R.B. and it would be voted upon" (Tr. p. 816, ll. 2, 3).

It is respectfully submitted that the findings of the Trial Examiner on this card are proper.

(d) *Mr. Crook* testified that he was given a card at a union meeting (Tr. p. 750, l. 21). To the question of Counsel of Respondent: "Did *they* say what the reason for the cards were?" he answered, "So that they could

come in and have a vote" (Tr. p. 750, ll. 24, 25). He knew that the union made a demand for recognition but did not ask for return of his signed card (Tr. p. 755, ll. 1-3).

On the stand the witness denied having read the card. Yet in an affidavit given by him to a Board Representative in June 1967 he said: "I recall reading the card before signing" (Tr. p. 757, l. 17; Res. Ex. 7).

The witness met with Mr. Sullivan, whom he referred to as "the lawyer", a week before the hearing. "The foreman said that someone wanted to see me, to speak to us" (Tr. p. 758, ll. 15, 22, 24 & 25). At that meeting Mr. Sullivan discussed with the witness the charges against the Respondent and the circumstances of the card signing (Tr. p. 759, ll. 24, 25). As to the contents of the interview with Mr. Sullivan, the witness testified:

> "A. He just told us that he was going to review the questions so that we would know what charges were brought against the company and such, that's all" (Tr. p. 760, ll. 4-7).

No wonder, that the witness "forgot" what he swore to in his affidavit, given a short time after the election, and testified in accordance with his conversation with the Respondent's representative, whom he conferred with only one week before the hearing.

The Trial Examiner compared the testimony of this witness and that of Mr. Smigelski, the union organizer, as to what he said at the meeting in connection with the authorization cards and concluded that Smigelski's testimony was more reliable (TXD, p. 35, ll. 14-23). The findings of the Trial Examiner made upon observation of both witnesses should be sustained.

(e) *Mr. Schmidt* was given a card by Sam Bellavia who told him the card was "about getting representation of a vote from the UAW" (Tr. p. 668, ll. 24-25; Tr. p. 669, l. 17). He took the card home, filled it out and

mailed it (Tr. p. 671, ll. 4-15). He read the card before he signed it (Tr. p. 672, ll. 21-23).

All the attempts of Counsel of Respondent to elicit something more, proved futile.

(f) *Mr. Carney* was given a card in the plant by a Mr. Dennis, who told him: "read it over and fill it out if you want to" (Tr. p. 734, ll. 14, 15). He signed the card and turned it over to a Mr. Bishop, some time thereafter in a "gin mill" (Tr. p. 735, ll. 23-25). He read the card before he signed it (Tr. p. 736, l. 14). A week before the hearing, he was called into the office of Mr. Sullivan, the Labor Relations director of the Respondent, where he was queried about his signing a card (Tr. p. 739, l. 1). This is another case alluded to by the Supreme Court.

(g) *Mr. Troup,* in fact, signed two cards, one at the union hall and one in the plant and sent it in (Tr. p. 605, ll. 5-12). One who really believed that he signed the cards for the purpose of an election *only*, would not go to the extent of signing two of them and mailing them. This testimony is another example of the Supreme Court's allusion.

(h) *Hartman read* the card before he signed it (Tr. p. 521, ll. 5-7). The card was given to him by one of the employees, whose name he did not recall (Tr. p. 520, ll. 6-8). In answer to a direct question, whether anything was told to him when he *received* the card, he answered, "Well, *they* were talking about getting an election ... ."

To the question of the attorney for the Employer, whether anything was said to the witness when he received his card, the witness replied:

> "A. Well, *they* were talking about getting an election for—that it was, the card was for, to get an election to try to get a union down there" (Tr. p. 520, ll. 10-13).

It is, respectfully, submitted, that in view of his testimony that the card was given to him by *one* of the employees and that he read it before signing it, his answers to the queries of the attorney for respondent, were so vague and contradictory that they must be disregarded. The testimony falls within the periphery of the allusion of the Supreme Court in the *Gissel* case (*supra*).

IV. Petitioner fails to present any grounds for review by this Court.

Rule 19(b) of the Rules of the Supreme Court as amended in 1970, sets forth the following grounds for granting a writ of certiorari from a decision of a Court of Appeals:

> "(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

It is, respectfully submitted that none of the above prerequisites are contained in the petition herein.

CONCLUSION

The petition for certiorari does not set forth any grounds for review by the United States Supreme Court and should be denied.

Dated: New York, N. Y.
December 2, 1970.

Respectfully submitted,

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